

No Pay in Lieu of Notice for Disabled Employees?

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Summary

Recently an interesting summary judgment decision on a wrongful dismissal case was released in Alberta. In *Belanger v. Western Ventilation Products Ltd. (Belanger)*, 2019 ABQB 571, the court held that while the reasonable notice period provided to the employee was insufficient, it had no practical effect as the employee was not entitled to any further payments from the employer after the employee became disabled and unable to work partway into their working notice period.

Facts

A 63-year-old employee received notice of termination by his employer and given 12 months' working notice. No pay in lieu of notice was offered. At around the same time as the employee received the working notice of the termination of his employment, he became ill and unable to work. Several months later, he started receiving disability payments. He was subsequently deemed totally disabled and will continue receiving disability payments until his 65th birthday.

Given the employee's age and seniority, both parties agreed he should have been provided with 24 months' notice. The employee argued that he should be entitled to severance payments representing 24 months' notice with no obligation to mitigate since he was unable to in light of his illness. The employer argued that the employee should not be entitled to any severance payments as he was unable to work during the notice period.

Decision

The Court found for the employer, on the basis that "employees should be put in the same position that they would have been in but for the termination without proper notice".¹ The Court held that an employee whose employment is terminated should not be put in a better position than one whose employment is not terminated. Since a disabled employee who cannot work is entitled only to their disability benefits, they

should not suddenly be entitled to their full salary during a working notice period simply because their employment was terminated.

The most interesting thing about this case is how the Court distinguished it from the British Columbia Court of Appeal decision in *Dunlop v. BC Hydro & Power Authority (Dunlop)*, 1988 CanLII 3217. *Dunlop* has very similar facts to *Belanger*, yet the Court in *Dunlop* awarded the employee his full salary during the notice period, finding that the severance amount was determined at the time of the termination and was unaffected by the employee's subsequent disability and inability to work.

In making the opposite finding in *Belanger*, the Court determined that the employee was provided pay in lieu of notice rather than working notice, and that his employer discontinued his disability benefits prior to him becoming disabled.

So do employers have to pay severance to disabled employees?

According to this decision – no. Provided that the employee was given working notice and not pay in lieu of notice, and that the employee has not been disqualified from receiving disability benefits. The importance of continuing disability benefits during the notice period cannot be overstated – as we know from the Ontario Court's decision in *Brito v. Canac Kitchens*, 2011 ONSC 1011, in which the employer was ordered to “step into the shoes” of the disability insurer when their former employee became disabled during the reasonable notice period, but after their disability coverage had ended.

This comes with some caveats, however. The first is that there are cases that find that an employer must pay the employee's full salary for the duration of the notice period, even in cases where the employee becomes disabled or dies during the reasonable notice period.² There is no guarantee that this case could not be distinguished in the future.

The second is that terminating the employment of a person with a disability is likely to raise human rights issues, separate from the question of reasonable notice entitlements.

Employer Takeaway

The main takeaway from this decision is that the possibility that an employee may become disabled during the reasonable notice period, may be a factor to consider when determining an employee's entitlements on termination of their employment. That being said, issues concerning disability in an employment context are often complex and you should consult an employment lawyer for advice on how best to do so in a specific context.

¹ *Belanger v. Western Ventilation Products Ltd*, 2019 ABQB 571 at para 14.

² See e.g. *Sylvester v British Columbia*, [1997] 2 SCR 315 at para 9; *McMaster Estate v Imark Corp*, 2000 CanLII 22740; *McLeod v 1274458 Ontario Inc*, 2017 ONSC 4073.

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